THIRUCHELVASEGARAM MANICKAVASEGAR *a*

v.

MAHADEVI NADCHATIRAM

HIGH COURT MALAYA, KUALA LUMPUR *b*
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S2 (S5)-23-13-2000]
19 JULY 2001

CIVIL PROCEDURE: *Pleadings - Striking out statement of claim - Requirements of an application to strike out - Drafting - Whether words to be struck out must be clearly identified - Alternative prayers - Whether applicant must elect to proceed with either of two inconsistent prayers - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d) - Whether grounds must be used disjuctively - Time - Whether application must be made before close of pleadings - Effect of O. 34 r. 2(1) Rules of the High Court 1980* *c* *d*

This was the defendant's appeal against the decision of the deputy registrar upholding the plaintiff's preliminary objections and dismissing the defendant's application ('encl. 30') to strike out the plaintiff's amended statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 ('RHC'). The plaintiff's said preliminary objections were: (i) that the defendant's prayers in encl. 30 were vague, imprecise and ambiguous; (ii) that the defendant could not proceed with both prayers (1) and (2) of encl. 30 together, but must elect to proceed with either one because both the said prayers were mutually inconsistent and were in the alternative; (iii) that encl. 30 was defective because grounds (b), (c) and (d) of O. 18 r. 19(1) RHC were used 'cumulatively' when the said grounds could only be used 'disjunctively'; and (iv) that encl. 30 was filed after the close of pleadings. *e* *f*

Held:

[1] Prayer (2) of encl. 30 was badly drafted; it merely asked the court to strike out "so much of the plaintiff's amended statement of claim" as the court shall deem just. The defendant had to but did not identify and specify with precision and clarity the lines or paragraphs that were sought to be struck out from the plaintiff's amended statement of claim. Hence, the deputy registrar was correct in upholding the plaintiff's first objection. *g* *h*

i

[2] Prayers (1) and (2) of encl. 30 were mutually inconsistent and the defendant could not proceed with both of them together. Whilst prayer (1) sought "that the plaintiff's amended statement of claim be struck out in its entirety and the plaintiff's action against the defendant be dismissed," prayer (2) sought "that so much of the plaintiff's amended statement of claim shall be struck out as the court shall deem just." The defendant had to elect to proceed with either one of the two alternative prayers but failed to do so despite having being given ample notice by the plaintiff. The deputy registrar was thus right in upholding the plaintiff's second objection.

[3] The defendant's grounds in support of encl. 30 stated that the plaintiff's amended statement of claim was "scandalous, frivolous, or vexatious and/or may prejudice, embarrass or delay the fair trial of the action and/or is an abuse of the process of the court." Such 'cumulative' use of limbs (b), (c) and (d) of O. 18 r. 19(1) RHC was unacceptable. The four limbs under O. 18 r. 19(1) RHC are 'disjunctive' and the defendant should not have used the words "and/or". The deputy registrar was right in upholding the plaintiff's third objection.

[4a] An application to strike out under O. 18 r. 19 RHC must normally be made before the close of pleadings. Enclosure 30 was filed after the close of pleadings and this was fatal. Furthermore, orders pursuant to the summons for directions had been made and the action had also been entered for trial. The deputy registrar was justified in upholding the plaintiff's fourth objection.

[4b] The recent amendments to O. 34 r. 2(1) RHC [*via* PU(A) 342, Jil 44, No 19, 21 September 2000] indicate that all applications to strike out under O. 18 r. 19 RHC must, without exception, be made before the close of pleadings. Furthermore, being a procedural section, O. 34 r. 2(1) RHC may also have retrospective effect if it does not affect the substantive rights of the parties in question.

[Defendant's appeal dismissed.]

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 ***(refd)***

Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman & Ors [1987] 2 MLJ 633 ***(foll)***

Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd & Ors (No 3) [1969] 3 All ER 897 ***(foll)***

Chan Min Swee v. Melawangi Sdn Bhd [2000] 7 CLJ 1 ***(refd)***

Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 ***(refd)***

Drummond-Jackson v. British Medical Association & Ors [1970] 1 All ER 1094 ***(refd)***
FH Faulding & Co Ltd & Anor v. Bristol-Myers Squibb Co & Anor [2000] 1 CLJ 800 ***(refd)***
Hardial Singh Sekhon v. Ahmad Hj Ramli & Ors [1981] 2 MLJ 96 ***(refd)***
Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trade Unions & Ors [1990] 2 CLJ 405 ***(refd)***
Kwan Yoon Fatt & Sons Sdn Bhd & Anor v. Trends Building Sdn Bhd & Ors [1994] 4 CLJ 996 ***(refd)***
Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 ***(refd)***
Lonrho Plc v. Fayed & Ors [1992] 1 AC 448 ***(refd)***
Mahendar Sucha Singh & Anor v. Emile Joseph (Penyelesai Ipoh Road Indian Co-operative Housing Society Ltd) [2000] 6 CLJ 257 ***(foll)***
Mohd Azam Shuja & Ors v. United Malayan Banking Corporation Bhd [1995] 2 MLJ 851 ***(foll)***
Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd & Anor [1999] 4 MLJ 629 ***(refd)***
N Carrupaiya v. MBf Property Services Sdn Bhd & Anor [2000] 4 CLJ 116 ***(refd)***
Ong Lean Sim & Anor v. Tio Kah Hin & Ors [1985] 1 MLJ 270 ***(dist)***
Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York [1998] 1 CLJ 424 ***(dist)***
Pertamina v. Kartika Ratna Thahir & Ors [1983] 1 MLJ 136 ***(refd)***
Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor [1997] 1 CLJ 775 ***(foll)***
Shell Marketing Co of Borneo Ltd v. Tan Sri Datuk Wee Boon ping [1990] 1 CLJ 564 ***(dist)***
Siang Yam Beng v. Marushin Canneries (M) Sdn Bhd & Anor [1995] 4 MLJ 691 ***(refd)***
Sim Seoh Beng v. Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 CLJ 491 ***(foll)***
Singham Sulaiman Sdn Bhd (berniaga sebagai Jones Lang Wootton) v. Berapit Development Sdn Bhd [2000] 4 AMR 4428 ***(dist)***
Tac Construction & Trading v. Bennes Engineering Bhd (No 2) [1999] 2 CLJ 518 ***(refd)***
Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd [1996] 2 MLJ 678 ***(foll)***
Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1 ***(refd)***
Wills v. Earls Beauchamp [1886] 11 PD 59 ***(refd)***
Wong Sai Tack v. Chien Hon Keong [2000] 1 CLJ 195 ***(foll)***
Yew Bon Tew v. Kenderaan Bas Mara [1983] 1 CLJ 11 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 18 r. 19(1)(b), (c), (d), (2), (3), O. 34 r. 2(1)

Other source(s) referred to:

Sarkar's Law of Evidence, 1993, 14th edn, pp 1724, 1725
The Supreme Court Practice 1999, Sweet and Maxwell, vol 1, p 348

For the plaintiff - Malik Imtiaz Sarwar; M/s M Segaram Advoc & Solicitors
For the defendant - Mahadevi Nadchatiram; M/s Mahadevi Nadchatiram & Partners

Reported by Gan Peng Chiang

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of a summons in chambers in encl. 30 the defendant applied under O. 18 r. 19 of the Rules of the High Court 1980 ("RHC") and/or under the inherent jurisdiction of the court for the following prayers:

(1) that the plaintiff's Amended Statement of Claim dated 22nd April 2000 be struck out in its entirety and the Plaintiff's action against the Defendant be dismissed and the Defendant be at liberty to enter Judgment for her costs to be taxed; including the costs of this application; alternatively

(2) that so much of the Plaintiff's Amended Statement of Claim shall be struck out as the Court shall seem just; and

(3) that the costs of this application be the Defendant's in any event.

The grounds in support thereof were listed in encl. 30 itself and it was worded in this way:

on the grounds that the case advanced by the Plaintiff in the Amended Statement of Claim is scandalous, frivolous or vexatious and/or may prejudice, embarrass or delay the fair trial of the action and/or is an abuse of the process of the Court in that:

(a) The claims in respect of the publications pleaded in Paragraphs 6, 7, 8A, 9, 10, 14 have already been raised and determined in earlier defamation and conspiracy proceedings brought by the Plaintiff against the Defendant, and so they are *'res judicata'* and it is an abuse of process for the Plaintiff to seek to re-litigate them in these proceedings; alternatively

(b) The claims in respect of the publications pleaded in Paragraphs 6, 7, 8A, 9, 10 and 14, or any of them, should have been litigated by the Plaintiff in the earlier proceedings and it is an abuse of process for the Plaintiff to seek to litigate them in these proceedings;

(c) The publications pleaded in Paragraphs 6, 7, 8A, 9 and 10 are protected by absolute privilege and so the Plaintiff's claims in respect of these publications are bound to fail;

(d) The Plaintiff has advanced all his claims in this action, including the slander claim pleaded in Paragraph 16, for a collateral and improper purpose;

(e) The words pleaded in Paragraph 6 are incapable of bearing meanings (a) and (c) pleaded in Paragraph 6A whether in their natural and ordinary meaning or by way of innuendo;

(f) The words pleaded in Paragraph 7 are incapable of bearing meanings (a) and (c) pleaded in Paragraph 8 whether in their natural and ordinary meaning or by way of innuendo;

(g) The words pleaded in Paragraph 8A are incapable of bearing meanings (a)-(d) and (f) pleaded in Paragraph 8B whether in their natural and ordinary meaning or by way of innuendo;

(h) The words pleaded in Paragraph 9 are incapable of bearing meanings (a) and (c) pleaded in Paragraph 9A whether in their natural and ordinary meaning or by way of innuendo;

(i) The words pleaded in Paragraph 10 are incapable of bearing meanings (a), (e)-(h),(j) and (l) pleaded in Paragraph 11 whether in their natural and ordinary meaning or by way of innuendo;

(j) The Plaintiff has failed to give any particulars of the alleged publications referred to in Paragraph 14;

(k) The allegation of express malice and/or bad faith in Paragraph 15 is irrelevant;

(l) The words pleaded in Paragraph 16 are incapable of bearing any of the natural and ordinary meanings pleaded in Paragraph 17;

(m) The words pleaded in Paragraph 16 are incapable of bearing the innuendo meanings (a)-(c), (e) and (f) pleaded in Paragraph 18;

(n) The Plaintiff has failed to give particulars of the individuals whom he alleges overheard the slander and whom he alleges knew the facts and matters that are relied upon in support of the innuendo meanings pleaded in Paragraph 18;

(o) The particulars in Paragraph 22 are incapable of supporting a claim for exemplary damages.

Enclosure 30 was dated 11 September 2000 and it was filed on the same day.

Having sight of encl. 30, the plaintiff wasted no time. He raised preliminary objections through an affidavit in reply affirmed by himself on 20 September 2000 which was filed on the next day as seen in encl. 27. The plaintiff in precise language, particularly at paras. 8.1 to 8.5 of encl. 27, itemised and fashioned his preliminary objections in these words:

8.1. I contend that the defendant's Summons-in-Chambers to strike off my suit is bad in law.

8.2. I also contend the defendant's affidavit as a whole is inadmissible for contravention of Order 42 rules 5(1) and 5(2) of the Rules of the High Court, 1980.

8.2. On the 12/09/2000, the Notice of Preliminary Objections to the Summons-in-Chambers was served on the defendant's solicitors. A copy of the Notice of Preliminary Objections is now produced, annexed hereto and marked as Exhibit 'M.1'. I crave leave to refer to the Notice of Preliminary Objections and the grounds set out therein for such objections.

8.3. On 29/05/2000, Summons for Directions was filed in Court in the present suit to set the action for trial. On 23/06/2000, the Senior Assistant Registrar heard the Summons for Directions. The defendant was represented by her counsel, Encik Sukhdev Singh and on the same day, the Senior Assistant Registrar gave directions although the defendant's counsel sought to postpone the matter. A copy of the Order is now produced, annexed hereto and marked as Exhibit 'M-2'. Pursuant to the directions within the time stipulated, I filed the List of Documents. However, to date the defendant failed to comply with the directions regarding filing of List of Documents. On the 22/07/2000 the suit herein was entered for trial. By a Summons-in-Chambers (Enclosure 15), the defendant sought (an) amendment to the Re-Amended Defence dated 08/05/2000 and the Summons-in-Chambers was heard on the 26/07/2000 and the Senior Assistant Registrar granted the Order for amendment. Pursuant to the Order, the defendant filed the Re-Re-Amended Defence dated 02/08/2000. On the 25/08/2000, the civil suit came for case management before the Honourable Justice Dato Dr. Kamalanathan Ratnam for the trial proper of the suit. However, his Lordship disqualified himself from hearing and directed the civil action be referred to Court 1 to decide the Judge who may hear the case. On the 01/09/2000, my solicitors sent a letter enclosing in all nine (9) volumes of documents to form (the) Common Agreed Bundle. A copy of the letter is now produced, annexed hereto and marked as Exhibit 'M.3'. No reply was received to the letter inspite of reminders. I contend that the defendant filed the Summons-in-Chambers in the present suit to avoid the trial proper of the civil action.

8.4. I contend that as the defendant has failed to comply with the Order of the Court made on 23/06/2000 by filing the List of Documents, she is prevented by law to annex any documents as exhibits to her affidavit as such exhibits must have to be disclosed and set out earlier in the List of Documents.

8.5. In the circumstances, the Summons-in-Chambers filed by the defendant is an abuse of process and ought to be dismissed on the grounds set out in the Notice of Preliminary Objections.

The plaintiff was indeed cautious. He took the liberty of putting the preliminary objections in writing and had it served on the defendant on 12 September 2000. A copy of that notice has been exhibited and marked as exh. "M 1" of encl. 27 and it was styled in the Malay language as "Notis Bantahan Permulaan". It was indeed aptly named.

Now, when the deputy registrar heard encl. 30 on 20 November 2000 she merely heard submissions on the preliminary objections and thereafter she adjourned the matter. It was more in the nature of reserving her decision. On 12 February 2001, she delivered her decision wherein she upheld the preliminary objections raised by the plaintiff and, consequently, as an offshoot thereof she dismissed the defendant's summons in chambers in encl. 30. It must be emphasised that there was no hearing on the merits of encl. 30 before the deputy registrar at all.

Aggrieved by the decision of the deputy registrar, the defendant filed a notice of appeal as seen in encl. 51. That notice of appeal was dated 14 February 2001 and it was filed on the same day.

But the defendant in arguing her own appeal before me went on a frolic of her own by choosing to submit in detail on the merits of the defendant's summons in chambers in encl. 30. I refused to consider the merits of encl. 30. I will only focus on the preliminary objections advanced by the plaintiff which was heard by the deputy registrar. In the event I am with the defendant, then the merits of encl. 30 ought to be heard by the deputy registrar. That I believe would be the best course of action to take (*N Carrupaiya v. MBf Property Services Sdn Bhd & Anor* [2000] 4 CLJ 116).

In the meantime, the plaintiff stayed vigilant. He had by way of a summons in chambers in encl. 34 filed an application to amend the statement of claim and this was done even before the preliminary objections was heard by the deputy registrar. To be precise encl. 34 was dated 11 October 2000 and it was filed on the same day. It is important to mention that encl. 34 had not been heard as yet. It was argued by the plaintiff that by choosing to submit on the merits of encl. 30 before this court, the defendant was pre-empting the hearing of encl. 34. That according to the plaintiff was an unfair practice which should not be condoned. Indeed that seemed to be the intention of the defendant. Once again I must emphasise that this judgment merely focussed itself on the preliminary objections as advanced by the plaintiff and nothing else. In due course encl. 34 will be heard.

The preliminary objections of the plaintiff may conveniently be categorised as follows:

(1) That the orders prayed for by the defendant in her summons in chambers in encl. 30 were vague, imprecise and ambiguous. It was pointed out that on these grounds alone – standing by themselves, would be sufficient to render the dismissal of encl. 30.

(2) That the defendant could not proceed with prayer (1) and prayer (2) in the summons in chambers in encl. 30 and that the defendant must make a stand and must elect between prayer (1) and prayer (2) of encl. 30 because:

(a) prayer (1) and prayer (2) were said to be mutually inconsistent and/or;

(b) at any rate, prayer (2) was said to be an alternative to prayer (1) and so the defendant could not proceed on these two grounds.

Consequently, it was pointed out that since the defendant had refused to elect and in fact decided to proceed with both the prayers, then by right encl. 30 ought to be dismissed in limine.

(3) In its summons in chambers in encl. 30 the defendant relied on O. 18 r. 19 of the RHC but in the grounds of her application she added cumulatively grounds (b) and/or (c) and/or (d) of O. 18 r. 19 of the RHC and lumped them together as one.

(4) That the defendant had failed to file the summons in chambers in encl. 30 promptly meaning before the close of the pleadings.

I will now endeavour to consider these four preliminary objections separately.

The First Preliminary Objection

Enclosure 30 was filed in pursuance to and under O. 18 r. 19 of the RHC and it would be ideal to reproduce that Order here. I must be specific. Order 18 r. 19 of the RHC contains three paragraphs, namely: paras. (1), (2) and (3). It is worded in this manner:

> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

Over the years, plenty of literature has been written on this very Order. Judges too contributed to the development of the law in this area. *The Supreme Court Practice 1999*, vol. 1, London Sweet and Maxwell carries a good write up on this Order. At p. 348 it states under category 18/19/4:

Applicant must specify complaint – The application should specify precisely what order is being sought, eg, to strike out or to stay or dismiss the action or to enter judgment, and precisely what is being attacked whether the whole pleading or indorsement or only parts thereof and if so the alleged offending parts should be clearly specified (*Williamson v. London, etc*. [1879] 12 Ch. D. 787 at 790). The application may be made on any or all of the grounds mentioned in this rule, but such grounds must be specified.

Gopal Sri Ram JCA writing separately for the Court of Appeal in *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127 laid emphasis on the practice and procedure adopted by our courts since time immemorial. At p. 142, this was what his Lordship said:

In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved: otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

I dealt with the issue of an imprecise order for striking out in *Wong Sai Tack v. Chien Hon Keong* [2000] 1 CLJ 195. At p. 199 to p. 200 this was what I said:

I might as well add that any application to strike out, expunge or amend any passage or paragraph in the pleadings must be itemised and set out in a clear and unambiguous manner, namely, setting out whether it is to strike out, expunge or amend and it must clearly identify the exact words, passages or lines in the pleadings that needed to be struck out, expunged or amended. Vagueness and ambiguity will result in it being struck out for uncertainty and lack of precision (*Dr. Lee Ratos & Ors v. Anthony Ratos s/o Domingos Ratos & Ors* [1996] 4 CLJ 33).

In fact prayer (2) of encl. 30 was a prayer that sought this court to strike out "so much of the plaintiff's amended statement of claim" – this must be in relation to the proposed amendment by the plaintiff in encl. 34 which had not been heard, as "the court shall seem just." It was a tall request. I hasten to add that no litigant could ask this court to make an order of that nature. It is as though this court was requested to advise the defendant and determine for the defendant as to what to do in regard to the proposed amended statement of claim. This court would certainly not tolerate prayer (2) of encl. 30 as drafted. In *Hardial Singh Sekhon v. Ahmad Bin Haji Ramli & Ors* [1981] 2 MLJ 96, the Kuala Lumpur High Court said (see the headnote):

> **Held,** it was not proper for the court to act as the plaintiff's counsel or to advise him in detail how to go about his pleadings. The application to strike out the statement of claim was therefore allowed and the plaintiff be at liberty to file afresh.

Buckley J in *Carl-Zeiss-Stiftung v. Rayner And Keeler, Ltd. And Others (No. 3)* [1969] 3 All ER 897 adopted a tough stand when his Lordship insisted, in matters pertaining to striking out of some parts of the pleadings, that it was incumbent on the applicant to show clearly what was required to be struck out. At p. 909 of the report, this was what his Lordship said:

> It appears to me that, if a party adopts the course taken by the plaintiff here, it is for the applicant to show that to allow the offending plea to stand in the pleading will in fact give rise to one of the vices mentioned in R.S.C., Ord. 18, r. 19, of such a quality and in such circumstances that the court ought, in the exercise of its discretion, to strike out the offending matter. Every case must depend on its own facts.
>
> When a party to an action seeks to obtain an order striking out some part of his opponent's pleading, it is, in my judgment, incumbent on him to indicate clearly what he wants to be struck out. This the present notice of motion does not do so far as para 1 of the defence of the third defendant (to which I will henceforth refer as 'the defence') is concerned.

At the end of the day, I am confronted with prayer (2) of encl. 30 and to me it was badly drafted. In prayer (2) of encl. 30 the defendant simply left the matter at the hands of the court. With respect, it appeared as though the defendant was asking the court to help her. A submission was made by Mr. Malik Imtiaz Sarwar to the effect that the defendant had left the paragraphs, passages and sentences in prayer (2) of encl. 30 as wide as possible. Indeed this submission was perfectly correct. In its present form, prayer (2) of encl. 30 needed to be "ironed out". That prayer did not state what were the relevant paragraphs, passages and sentences of the proposed amended statement of claim that needed to be struck out. In my judgment, the defendant was duty

bound to identify with precision, with clarity and with exactitude what was sought to be struck out. As it turned out the defendant did not attempt to remedy the defect in prayer (2) of encl. 30 even though the notice of preliminary objection had been served on the defendant on 12 September 2000. In my judgment, the defendant cannot leave to this court to decide what paragraphs, passages, lines and sentences to be struck out. It would thus be correct to say and I so say that the orders sought for by the defendant were vague, imprecise and ambiguous. To hold otherwise would pervert the course of justice. Language is an essential tool of communication. Mastery of the English language would certainly enable legal practitioners to draft their pleadings in an orderly fashion. Sad to say, prayer (2) of encl. 30 was badly drafted. The way it was drafted, it served no useful purpose to the defendant at all. In the circumstances, the deputy registrar was entirely correct when she upheld the preliminary objections advanced by the plaintiff and thereafter dismissed the defendant's summons in chambers in encl. 30. This was my judgment and I so hold accordingly.

The Second Preliminary Objection

I need to narrate the material facts pertinent and germane to the occasion. The deputy registrar wrote a written decision as seen in encl. 50 and there she alluded to the fact that the defendant did not choose to elect but rather maintained that the summons in chambers in encl. 30 particularly prayers (1) and (2) were prepared not only on the advice of the Queen's counsel but by the Queen's counsel himself and so the defendant decided to proceed on both these two prayers. It was quite an interesting proposition to say that encl. 30 was prepared by a Queen's counsel. Be that as it may, from the court file the following material facts may be pieced together:

(a) The defendant filed the summons in chambers in encl. 30 on 11 September 2000. That encl. 30 too was dated the same date.

(b) It seemed that the unsealed copy of the summons in chambers in encl. 30 was served on the plaintiff's solicitors on 11 September 2000.

(c) On 12 September 2000, the plaintiff's solicitors served the notice of the preliminary objections to the defendant as reflected in exh. "M1" of encl. 27 – an affidavit of the plaintiff that was affirmed on 20 September 2000 and filed on 21 September 2000.

(d) There being no response, the plaintiff's solicitors swiftly acted and by letter dated 23 September 2000 enquired from the defendant whether the defendant would be proceeding on prayers (1) and (2) of encl. 30 or whether the defendant will be electing. This very letter was annexed as an exhibit marked as "M 13" of the plaintiff's "Affidavit Jawapan Kedua

(No: 2)" that was affirmed on 12 October 2000 and filed on the same day as seen in encl. 35. That letter dated 23 September 2000 marked as exh. "M 13" of encl. 35 was worded in this way:

MESSRS. MAHADEVI & PARTNERS
Advocates & Solicitors
Ground Floor, Lee Rubber Building
No. 145, Jalan Tun H.S. Lee
50000 Kuala Lumpur

Dear Sirs,

RE: KUALA LUMPUR HIGH COURT C.S. NO: S5-23-13-2000 THIRUCHELVASEGARAM A/L MANICKAVASEGAR V. MAHADEVI A/P NADCHATIRAM

We refer your attention to your undated and unsealed Summons-in-Chambers served on us on 11/09/2000 and our Notice of Preliminary objections dated 12/09/2000 served on you.

Please let us know:-

(1) whether you would be seeking both the orders sought under 1 and 2 in the Summons-in-Chambers; or

(2) whether you will be electing to proceed either 1 or 2 of the Orders sought in the Summons-in-Chambers and if so, which Order you will be seeking.

An early reply will be greatly appreciated so as to enable us to prepare our case.

Yours faithfully,

Sgd (Illegible).

The defendant played possum and did not respond. Once again the plaintiff's solicitors by a letter dated 5 October 2000 notified the defendant of the defendant's failure to reply and that the plaintiff would treat that failure to mean that the defendant was proceeding on both prayers (1) and (2) of encl. 30. This very letter was annexed to encl. 35 and marked as exh. "M 13" and it was worded thus:

MESSRS. MAHADEVI & PARTNERS
Advocates & Solicitors
Ground Floor, Lee Rubber Building
No. 145, Jalan Tun H.S. Lee
50000 Kuala Lumpur

Dear Sirs,

RE: KUALA LUMPUR HIGH COURT C.S. NO: S5-23-13-2000 THIRUCHELVASEGARAM A/L MANICKAVASEGAR V. MAHADEVI A/P NADCHATIRAM

We refer your attention to our letter dated 23/09/2000.

We note that to date you have not replied to our said letter.

Please let us have an immediate reply.

If we do not hear from you, we take it that you will be proceeding with both the Orders 1 and 2 in the Summons-in-Chambers.

Yours faithfully,

Sgd (Illegible).

As I said earlier before the deputy registrar it was emphasised that encl. 30 was prepared by a Queen's counsel and so the stand of the defendant was that both the prayers would be relied upon. On these set of facts, Mr. Malik Imtiaz Sarwar submitted that it was now not open for the defendant to depart and elect to proceed on prayer (1) or prayer (2) of encl. 30. I repeat that by prayer (1) of encl. 30, the defendant was seeking "that the plaintiff's amended statement of claim dated 22 April 2000 be struck out in its entirety and the plaintiff's action against the defendant be dismissed and the defendant be at liberty to enter judgment for her costs to be taxed, including the costs of this application". Again, I wish to repeat that by prayer (2) of encl. 30, the defendant was seeking:

> that so much of the plaintiff's Amended Statement of Claim shall be struck out as the court shall seem just.

It would be apparent that prayer (1) and prayer (2) of encl. 30 are mutually inconsistent and that being the case, the defendant cannot proceed with both prayers. On a different set of facts but in the same context, I had occasion to say in *Tac Construction & Trading v. Bennes Engineering Berhad (No: 2)* [1999] 2 CLJ 518, 525 the following:

> Now, if it is argued that the defendant has sought for an order for stay of execution and an order for stay of winding-up proceedings, both these two orders being mutually exclusive to one another then the following six nagging issues arise for determination:
>
> (a) If the orders sought by the defendant are distinct and mutually exclusive of one another, then the question to pose would be whether the defendant should apply for an order for stay of the winding-up proceedings by way of a separate originating summons?

(b) If the answer to question (a) above is in the affirmative, the next question to pose would be whether it is proper for the defendant to apply by way of a summons-in-chambers for an order for stay of proceedings contemporaneously with the application for an order for stay of execution? This would convert the defendant's application in Encl 36 to be a hybrid form of application that cannot be permitted or allowed.

In short, the defendant was blowing "hot and cold". By prayer (1) of encl. 30, the defendant sought that the plaintiff's case be dismissed and that judgment be entered against the plaintiff for her costs, both for the suit and the application. It seemed that the defendant by prayer (1) of encl. 30 was seeking an end to the plaintiff's claim as filed. But by way of prayer (2) of encl. 30, the defendant was in a dilemma and it seemed that the defendant was conceding that the plaintiff's suit cannot be dismissed but instead that suit could go on *ad infinitum* but subject to such parts which this court thought fit to strike out. That would appear to be the correct interpretation of prayer (1) and prayer (2) of encl. 30. In my judgment, prayer (1) and prayer (2) are mutually exclusive. They cannot stand together. Prayer (1) of encl. 30 asked for a different relief to that of prayer (2). It was so clear that even a first year law student would know the difference.

To be fair to the defendant, it was stated clearly that prayer (2) was an "alternative" to prayer (1) of encl. 30. When one is talking about an alternative order, one case propels itself to the forefront. It is the case of *Mohd Azam Shuja & Ors v. United Malayan Banking Corporation Bhd* [1995] 2 MLJ 851, a decision of the Court of Appeal. There NH Chan JCA (as he then was) writing a separate judgment had this to say at p. 861 of the report:

> In my judgment, I think that where there are two such applications in one summons-in-chambers, even though the applications are in the alternative (which, incidentally, means one or the other), the party applying has to elect as to which application he wishes to proceed on. This is because that since both the applications are the applicants' and since it has been determined by this court in the present appeal that the two applications could not be proceeded on in the same summons in chambers, the summons would be dismissed unless the applicant elects as to which of the two applications he would wish to proceed on.

and further down the same page, his Lordship continued:

> Just as a trial judge has no power to dictate to a litigant what evidence he should tender, in all civil proceedings the court has no power to dictate to a litigant what form of application he should make or what kind of order he should apply for. In the same way, just as 'the court cannot give a direction about evidence unless one of the litigants desires such direction to be made' (per Lord Templeman [1987] 1 MLJ 433 at p. 436; [1987] 4 PCC 691 at pp

> 696-697; [1987] 1 WLR 413 at p 418), the court also cannot give a direction as to which one of the applications (if there are more than one) the litigant, who is applying, should choose to apply for an order on. Of course, a judge may indicate to the applicant that unless he elects as to which application he is applying for an order on, his summons-in-chambers is likely to fail. Since it is the applicant who is applying to the court for an order, he has to decide for himself which is the one he is asking for an order on, otherwise, the summons in chambers will be dismissed because the applicant cannot proceed on both applications together.

Siti Norma Yaacob JCA (now FCJ) writing a separate judgment concurred with the decision of NH Chan JCA. At p. 862 of the report, this was what her Ladyship said:

> In this respect, I concur with the procedure adopted by my brother, NH Chan JCA, and for the reasons given that the respondent must elect which of the alternative prayers it wishes to proceed with before its application can be heard on its merits.

It must be recalled that by letter dated 23 September 2000 which letter was received by the defendant's law firm on 25 September 2000, the plaintiff's solicitors brought to the attention of the defendant the defects in the prayers sought. It must also be recalled that by that very letter, the plaintiff had put the defendant to elect as to the prayers. There being no response, a reminder was sent on 5 October 2000. In that reminder, a reply was sought and it too contained a caveat in that in the event no reply was received, it would be taken that the defendant intended to proceed on both the prayers – namely, prayers (1) and (2) thereof. To date, it was submitted that no reply was sent nor received. It was also submitted that the defendant's solicitors should have elected upon receipt of the letter dated 23 September 2000. Now it was submitted that it was too late to elect. It was also submitted that by the defendant's conduct it was clear that the defendant had affirmed that she had intended to proceed with both the prayers.

In my judgment, the notice of preliminary objections and the letters dated 23 September 2000 and 5 October 2000 as alluded to above, gave the defendant ample opportunity to elect. It was quite obvious that the purpose of giving that notice of preliminary objections to the opposite party was to prevent surprise as well as to enable the opposite party to remedy the defect. The notice of preliminary objections had put the plaintiff in good stead. I need to highlight and emphasise on the speech of Mahadev Shankar J (as he then was and who later rose to be a Court of Appeal Judge) in the case of *Kwan Yoon Fatt & Sons Sdn. Bhd. & Anor. v. Trends Building Sdn. Bhd. & 8 Ors* (1994) 4 CLJ 996. At page 998 of the report, his Lordship aptly said that:

> Order 18 r. 8(1)(b) of the Rules of the High Court 1980 imposes a mandatory obligation upon a party to disclose to the other side any matter which, if not specifically pleaded, might take the opposite party by surprise. I would also refer to the Legal Profession (Practice & Etiquette) Rules 1978 r. 12 which prohibits taking a defence intended merely to delay proceedings and r. 32 which exhorts Counsel not to allow the feeling between opposing clients to influence their conduct towards each other. Counsel would do well to remember that as officers of the Court they have an overriding duty to the Court not to ambush their opponents with highly technical points whose effect is only to cause needless embarrassment, expense and delay.

Mr. Malik Imtiaz Sarwar was perfectly right when he submitted that the defendant must make a choice to elect. It was according to him rather a duty on the defendant's part to make an election. That duty must certainly be discharged by the defendant to the fullest. *Sarkar's Law Of Evidence*, 14th edn, 1993 at p. 1724 contains illuminating passages in regard to an estoppel by election that should be reproduced in this judgment. There the learned authors by the names of M.C. Sarkar, S.C. Sarkar and Prabhas C. Sarkar wrote at p. 1724:

> The common law principle which puts a man to his election between alternative inconsistent courses of conduct (see next heading: *'Estoppel by Inconsistent Position'*,) is different from the equitable doctrine of election. An estoppel by election may arise when a party having two inconsistent remedies chooses to elect one, and thereby induces another to alter his position. When he has made his choice he will be held firmly to the remedy adopted (see *Scarf v. Jardine*, 7 App Cas 345, 360; *Streatfield v. S*, 1735, JW & T 9th edn 373 (quoted in *Ramakatayya v. Veeraraghavayya*, 52 M 556: A 1929 M 502). *Taylor v. Hallard* [1902] 1 KB 676; *Jones v. Carter*, 15 M & W 718; *Morel Bros & Co, Ltd v. Westmorland* [1904] AC 11: 20 TLR 38; *Moore v. Flanagan* [1920] 1 KB 919; *United Australia Ltd v. Barclay's Bank Ltd* [1941] AC 1, 30: 109 LJKB 919; *Dexters Ltd v. Hill Crest & c*, [1926] 1 KB 348; *Lissenden v. Bosch Ltd* [1940] AC 412: 109 LJKB 895; *Asia v. Nurjehan*, 59 C 1464). Where a party has two rights, the mere exercise of one does not amount of waiver of the other but if there are alternative rights, the exercise of one right might imply that the party has waived the exercise of the other (*Humayun Properties v. Ferrazzinis*, A [1963] C 473). Election is a principle not peculiar to the English law, but common to all law which is based on the rules of justice, *viz* the principle that a party shall not at the same time affirm and disaffirm the same transaction – affirm it as far as it is for his benefit and disaffirm it, as far as it is for his prejudice (*Rungama v. Atchama*, 4 MIA 1 : 7 WR 57). This kind of estoppel arises from the principle that a man cannot approbate and reprobate. Silence itself does not constitute election, but it is the duty of the person who is to elect, not to postpone his election for such a long period as might induce another to alter his position in the belief that he has elected to let things remain as they are. In that case he will be estopped from exercising his election in a different way (*Clough v. L & N W Ry Co*, LR 7 Ex 26, 35; *Aaron's Reefs v. Twiss* [1896] AC 273, 290, 294).

Continuing on the same page and spilling over to p. 1725, the learned authors said:

> The principle of election does not ratify a void transaction but merely imposes a personal bar on the benefiting party and the fact that an alienation is void does not prevent the application of the doctrine (*Shanmugam v. SA* [1968] M 207).
>
> Where an agent delivered goods to the customer contrary to the principal's instructions and the latter obtained a decree against the purchaser, he cannot on non-satisfaction of the decree sue the agent. The reason is that having elected to treat the delivery to him as an authorised delivery, they cannot treat the same act as a mis-delivery. To do so would be to approbate and reprobate the same act (Per Bankes LJ, in *Verschures & c v. Hull & c* [1921] 2 KB 608).
>
> The doctrine of election is not confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and turn round and say that it is void for the purpose of securing some other advantage (*Bonagiri v. Karumuri*, A [1938] M 1004: 1938, MWN 1013). The principle of election does not forbid a party from claiming the same relief in different suits in respect of the same property though the grounds of relief are different and inconsistent (*Nagubai v. Shama Rao*, A [1956] SC 593: 1956 SCR 451).
>
> To be estopped by election the party should have sufficient information and knowledge to be able to recognise that he has two rights inconsistent with each other. It is not necessary that he should be aware of the implications that may follow upon his election (*Haridas v. Vijaylakshmi*, A [1956] B 721).

I am certainly bound by the decision of the Court of Appeal in *Mohd Azam Shuja & Ors v. United Malayan Banking Corporation Bhd (supra)* and on the strength of that binding decision the defendant's summons in chambers in encl. 30 was rightly dismissed by the deputy registrar. It was argued by Madam Mahadevi that the case of *Mohd Azam Shuja & Ors v. United Malayan Banking Corporation Bhd (supra)* was limited in its scope as it confined itself to applications under O. 14 and 18 r. 19 of the RHC. With respect, the decision of the Court of Appeal in *Mohd Azam Shuja & Ors v. United Malayan Banking Corporation Bhd (supra)* was all encompassing. It held that a party to the summons in chambers cannot proceed on both the applications for striking out a pleading as well as for summary judgment. In my considered view – the Court of Appeal's decision would apply to all cases and to all occasions so long as there are alternative applications in one summons in chambers.

The Third Preliminary Objection

In its present form, the summons in chambers in encl. 30 was defective. While the defendant relied on O. 18 r. 19 of the RHC in its prayers, yet in its grounds the defendant added cumulatively grounds (b), (c) and (d) of O. 18 r. 19 of the RHC together and lumped them together as one. Allow me to elaborate. In the grounds supporting the application in encl. 30, the defendant conveniently stated that the amended statement of claim be struck off for being scandalous, frivolous or vexatious and/or it may prejudice, embarrass or delay the fair trial of the action and/or it is an abuse of the process of the court. The defendant did not seek to make any difference whether those averments were stated in the main body of the summons in chambers or incorporated as grounds as set out by the defendant. It seemed that the defendant was not particularly concerned about the procedures as set out in the RHC. What was crystal clear was this: that the defendant was relying on O. 18 r. 19(1)(b) and/or (c) and/or (d) of the RHC. Such a procedure is not permitted and cannot be condoned at all. In *Sambu (M) Sdn. Bhd. v. Stone World Sdn. Bhd. & Anor.* [1997] 1 CLJ 775, 778, I had occasion to consider the same problem and there I said:

> The word 'or' appears between (a), (b), (c) and (d) of O. 18 r. 19(1) of the RHC and in ordinary usage the word 'or' is said to be disjunctive (*Uddin v. Associated Portland Cement Manufacturers Ltd.* [1965] 2 QB 582; *R. v. Surrey Quarter Sessions, ex parte Commissioner of Metropolitan Police* [1963] 1 QB 990). In my judgment, the second defendant when resorting to O. 18 r. 19(1) of the RHC must be very specific and must not cumulatively add (a), (b), (c), (d) together and lump them as one as it would run counter to the explicit provisions of r. 19(2) of O. 18 of the RHC.

Faiza Tamby Chik J in *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd & Anor* [1999] 4 MLJ 629 generously adopted *Sambu (M) Sdn. Bhd. v. Stone World Sdn. Bhd. & Anor (supra)*. The principle in *Sambu* too was vigorously applied in *FH Faulding & Co. Ltd & Anor v. Bristol-Myers Squibb Company & Anor* [2000] 1 CLJ 800. On the same subject matter, I too echoed the same sentiments in *Mahendar a/p Sucha Singh & Anor v. Emile Joseph (Penyelesai Ipoh Road Indian Co-operative Housing Society Ltd)* [2000] 6 CLJ 257; and at p. 261 to p. 262 of the report thereto, this was what I said:

> Now, Encl 25 was drafted by citing Order 18 r 19(a), (b) or (c) of the RHC which clearly was in error as it should be 'Order 18 r 19(1)(a) or (b) or (c) of the RHC.' There was clearly an omission to cite 'paragraph (1)' after r. 19 and there was also an omission to add the disjunctive word 'or' before paragraph (1)(b) of r. 19. The word 'or' has always meant to be read disjunctively (*Uddin v. Associated Portland Cement Manufacturers, Ltd* [1965] 2 QB 582; and *R v. Surrey Quarter Sessions, Ex p Commissioner of*

Metropolitan Police [1963] 1 QB 990) and our RHC too must be read accordingly. There should not be an exception in the context of our Order 18 r 19 of the RHC. Since the plaintiffs were also relying on paragraph (1)(a), no evidence shall be admissible to strike out under this ground (*Zakaria bin Mohamed Esa v. Dato Abdul Aziz bin Ahmad & Ors* [1982] 2 MLJ 222) and this must surely mean that affidavit evidence too is inadmissible and should not be considered at all (*S Manickam & Ors v. Ismail bin Mohamed & Ors* [1997] 2 MLJ 90; *Ibrahim bin Mohamed v. Ketua Polis Daerah Johor Bahru & Ors* [1996] 3 AMR 1964; *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 2 AMR 2477, FC; *Shaik Zolkiffly bin Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff bin Sheik Latiff, deceased v. Majlis Agama Islam Pulau Pinang and Seberang Perai* [1997] 3 MLJ 281; *Paul Law Ung Hua & Anor v Hong Wei Organisation Sdn Bhd* [1996] 4 MLJ 489; and *Hii Teng Tuong, Alphonsus v. Lok Min Wah & Ors* [1995] 4 MLJ 259) and all the court needs do is to consider only the pleading and decide whether it should be struck out (*Peck v. Russell* [1923] 4 FMSLR 32) and further the exercise does not involve a minute examination of the various documents and the facts thereto (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1993] 2 AMR 1969, SC). Fortunately, the defendant also relied on r. 19(1)(b) or (c) of Order 18 of the RHC and this entailed an examination of the averments in the statement of claim and the statement of defence together with the relevant affidavits filed in relation to encl 25 (*Gasing Heights Sdn Bhd v. Aloyah bte Abd Rahman & Ors* [1996] 3 AMR 3001; and *Saw Seng Kee v. Nadzri & Ng Securities Sdn Bhd* [1996] 2 AMR 1578, CA)"

Not to be outwitted Madam Mahadevi cited the case of *Siang Yam Beng v. Marushin Canneries (M) Sdn Bhd & Anor* [1995] 4 MLJ 691 and argued that the court there held that all the limbs can be used in one shot. With respect, she misread the decision of the court in that case. There I said at p. 698 to p. 699 of the report:

Here both Marushin and Tetuan Rubiah & Ong in the present suit selected RHC O. 18 r. 19 to ground their application against Siang.

Pleadings may be struck out on the following grounds (see RHC O. 18 r. 19(1)):

(a) it discloses no reasonable cause of action or defence; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court.

and these grounds may overlap and at times merge with one another thereby giving it a shot in the arm, so to speak, for the applicants (*Tunku Abdul Rahman Putra Al-Haj & Ors v. Dato Seri Dr Mahathir Mohamad* [1989] 1 MLJ 48 may serve as a striking example of overlapping). Both *Marushin* and

Tetuan Siti Rubiah & Ong in the present suit relied on grounds (a), (b) and (d) of RHC O. 18 r. 19(1) and even though they are not bound to file affidavits-in-support of their applications (see *Datuk (Datu) Amir Kahar bin Tun Haji Mustapha v. Tun Mohd Said bin Keruak* [1994] 3 MLJ 737 as applied in *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287), yet they both adopted the safest course by filing affidavits as can be seen through the facts as narrated in the early part of this judgment. It is pertinent to mention that though RHC O. 18 r. 19(2) states that 'no evidence shall be admissible on an application under paragraph (1)(a)', yet the courts in this country have resorted to the affidavits and the pleadings – to look, decide and weigh in a balance its contents in the course of adjudicating applications under this order.

and that ought to put things right. In my judgment, the third preliminary objection should be ruled in favour of the plaintiff and I so ruled accordingly.

The Fourth Preliminary Objection

This involved the question of delay and it was a very crucial factor.

Time was certainly of utmost importance and any delay would be considered fatal. It was part and parcel of my judgment that there was delay on the part of the defendant when she filed the summons in chambers in encl. 30 to strike out the amended statement of claim. It cannot be denied that encl. 30 was filed **after**:

(1) the pleadings were closed;

(2) the summons for directions were filed and the necessary orders were made thereto and, of importance, the action was entered for trial; and

(3) the said action came up for pre-trial conference before RK Nathan J who later disqualified himself from hearing the case.

Chronologically speaking, the relevant events behind the whole episode were:

(1) The pleadings were deemed closed on 30 May 2000 – fourteen days after the plaintiff filed his amended reply. The defendant after filing the defence on 3 April 2000 proceeded to amend the defence by filing the amended defence on 17 April 2000 and that amendment was done within time. The plaintiff then proceeded to re-amend the claim and the defendant responded by filing the re-amended defence on 8 May 2000.

(2) On 29 May 2000 the summons for directions was filed. This was in compliance with O. 25 of the RHC.

(3) On 23 June 2000, the senior assistant registrar gave the orders that were sought for in the summons for directions.

(4) On 19 July 2000, the plaintiff filed the affidavit verifying the list of documents. The defendant should have filed the list of documents on or before 23 July 2000 but she did not do so.

(5) On 18 July 2000, by way of a summons in chambers as reflected in encl. 15, the defendant sought an amendment to the re-amended defence.

(6) On 22 July 2000, the action was entered for trial.

(7) On 26 July 2000, the defendant was allowed to amend the re-amended defence.

(8) On 2 August 2000, the defendant filed the re-re-amended defence.

(9) On 25 August 2000, the action came up for case management before RK Nathan J. That case management went on as scheduled.

(10) On 1 September 2000, the plaintiff's solicitors sent nine (9) volumes of documents as set out in the list of documents. It must be pointed out that under the amended O. 34 of the RHC, a party to an action has to file the bundle of documents in court and at the same time that bundle has to be served on the opposite party.

It was contended on behalf of the defendant that the plaintiff's solicitors were informed of the application to strike out and so it was argued that the defendant could make the application as reflected in encl. 30. This contention was hotly disputed. The plaintiff submitted that such a contention was false and misleading and it was made as a mere excuse to make the application after the defendant discovered that it was too late in the day to file such an application. A submission was made on behalf of the plaintiff to the effect that the defendant had unilaterally purported to include an order to be incorporated within the order for the summons for directions when in reality there was no such order.

I pause here for a moment and take stock of the situation. The plaintiff challenged the summons in chambers in encl. 30 which was basically for striking out. The law on striking out is crystal clear. That it must be filed promptly and as a rule before the close of the pleadings. Here, the pleadings were deemed closed on 30 May 2000 while the application for striking out in encl. 30 was filed on 11 September 2000. The law journals are replete with authorities on striking out. The court in *Pertamina v. Kartika Ratna Thahir & Ors* [1983] 1 MLJ 136 held that only in plain and obvious cases that

recourse should be had to the summary process under O. 18 r. 19 of the RHC. In *Bank Bumiputra Malaysia Berhad & Anor. v. Lorrain Esme Osman & Ors.* [1987] 2 MLJ 633, the court held that the application under O. 18 r. 19 of the RHC must be made promptly and as a rule before the close of the pleadings. In *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor.* [1984] 2 MLJ 105 the then Federal Court held that as long as the statement of claim disclosed some ground of action, and that the mere fact that the plaintiff was unlikely to succeed at the trial of the action was not a ground for striking out. Lord Diplock in *Tractors Malaysia Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1 PC observed that:

> The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution.

In *Wills v. Earls Beauchamp* [1886]) 11 PD 59 the court held that the summary process for striking out was a drastic remedy and the court would only exercise its coercive powers to dismiss the action with the greatest care and in the clearest case. In *Chan Min Swee v. Melawangi Sdn Bhd* [2000] 7 CLJ 1, 39 in regard to O. 18 r. 19(1) of the RHC, I had this to say:

> I must emphasise the phrase 'at any stage of the proceedings' and it must necessarily mean that a party can make the application at any time up to the close of pleadings and, in special circumstances, even after the close of pleadings (see the speech of Zakaria Yatim J (as he then was) in *Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman and another action* [1987] 2 MLJ 633 particularly at p 635 of the report).

In *Wong Sai Tack v. Chien Hon Keong (supra)* particularly at p. 200 of the report, I alluded to the rule in regard to striking out in these words:

> Even though the rule states that the order to strike out can be made 'at any stage of the proceedings', there must, nevertheless, be promptitude in applying (*Jamir Hassan v. Kang Min* [1991] 3 CLJ 2490). Of course the court has a discretion to allow the application to strike out even after the close of the pleading, but it rarely happens and the court will almost always refuse to exercise such a discretion where the matter has been set down for trial: *Tengku Ali Ibni Almarhum Sultan Ismail v. Kerajaan Negeri Terengganu Darul Iman* [1994] 2 CLJ 685 and *Siang Yam Beng v. Marushin Canneries (M) Sdn Bhd* [1995] 4 MLJ 691. It is a drastic measure and a draconian method to strike out an action summarily (*Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1; and *Tengku Jaafar bin Tengku Ahmad v. Karpal Singh* [1993] 4 CLJ 183) and the court must be wary about it and will only strike out where the claim is obviously unsustainable (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; *Arah Cipta Sdn Bhd & Anor v. Kian Kee Sawmills (M) Sdn Bhd & Ors* [1997] 2 CLJ 40b; *Lai Yoke*

> *Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; and *Tan Keat Seng, Kitson v. Kerajaan Malaysia* [1996] 2 CLJ 722). To determine what is 'plain and obvious' would entirely be objective in its approach and it requires that kind of perception which judges are known to have. Sometimes a long and elaborate hearing is required before the judge is satisfied that there is no cause of action (*Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd and Other Appeals* [1996] 1 CLJ 393). To reiterate, the present case contains a point of law and it is unjust and it would occasion a failure of justice to simply strike it down (*Oh Theresa v. Sia Hok Chai* [1992] 1 CLJ 170).

In *Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678 the court held that an application to strike out cannot be made after the order had been made in the summons for directions and after the action had been entered for trial. Likewise in the present appeal before me the action had been entered for trial and it was too late in the day for the defendant to strike out the plaintiff's claim. Factually speaking *Ong Lean Sim & Anor. v. Tio Kah Hin & Ors.* [1985] 1 MLJ 270 and *Shell Marketing Co. Of Borneo Ltd. v. Tan Sri Datuk Wee Boon Ping* [1990] 1 CLJ 564 were cases where the actions had not been entered for trial and these cases were certainly poles apart from the present appeal.

Incidentally the senior assistant registrar had on 23 June 2000 made the relevant orders in relation to the summons for directions and no appeal whatsoever were lodged by the defendant. To accede to the defendant's request to strike out the action at this juncture would entail overruling and setting aside of the orders of the senior assistant registrar in regard to the summons for directions notwithstanding that there was no appeal lodged by the defendant. Without an appeal, this court has no power to interfere.

It is interesting to note that the RHC has since been amended by way of a P.U.(A) 342, Jil. 44, No: 19 dated 21 September 2000 and it came into effect on 22 September 2000. That amendment saw the introduction of O. 34 which introduced pre-trial case management. Of relevance would be O. 34 r. 2(1) of the RHC which states that:

> The plaintiff shall, not later than 14 days after the close of pleadings under Order 18, rule 20, cause to be issued from the Registry of the Court a notice in Form 63 requiring the parties to the action to attend before the Judge.

and flowing from this it was ingeniously argued that the defendant must apply to strike out before the close of the pleadings and that any application to strike out under O. 18 r. 19 of the RHC must be read together with O. 34 of the RHC. It was also submitted that all the earlier reported cases which stated, *inter alia*, that the applications for striking out can be made after the close of the pleadings must, in view of O. 34 of the RHC, be held to be

inapplicable. But Madam Mahadevi took exception to these arguments. She too advanced a counter argument. She argued that O. 34 of the RHC did not apply because her summons in chambers in encl. 30 was dated 11 September 2000. Mr. Malik Imtiaz Sarwar replied and he submitted that although the amendment that brought into the picture O. 34 of the RHC was dated 21 September 2000 – as I said it came into effect on 22 September 2000, yet he submitted that O. 34 of the RHC applied to all proceedings whether filed before or after the amendment. He submitted that the true criteria to decide whether the amended O. 34 of the RHC is prospective or retrospective can readily be appreciated by reference to the decision of Gopal Sri Ram JCA in *Sim Seoh Beng @ Sim Sai Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad* [1995] 1 CLJ 491. In that case at p. 496 of the report, his Lordship said:

> In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, *prima facie* that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity. Contra, where the written law does not affect substantive rights.

and applying that passage to the present appeal, the question to pose would be whether the amended O. 34 of the RHC affected the substantive rights of the defendant if "applied retrospectively." In my judgment, the fact that the defendant had filed encl. 30 on 11 September 2000, that very act of filing did not vest in the defendant any vested right to the proceeding. This was also the view expressed by Gopal Sri Ram JCA in *Sim Seoh Beng* and his Lordship derived the authority for that proposition by citing the case of *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 AC 553, [1983] 1 CLJ 11 – a decision of the Privy Council. At p. 509 of the report in the case of *Sim Seoh Beng*, his Lordship Gopal Sri Ram JCA aptly said:

> There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

In my judgment, to accede to the defendant's argument that the amended O. 34 of the RHC did not apply to encl. 30 would simply mean that the amendments to the RHC *vide* P.U. (A) 342 would be rendered ineffective. In my judgment, the mere filing of an application in encl. 30 did not confer on the defendant a vested right at all. In my judgment, the defendant is bound to comply with the amended O. 34 of the RHC.

Madam Mahadevi cited authorities to show to this court that delay would not bar this court from hearing encl. 30. But, with respect, the authorities relied by her were all confined to O. 14 applications. In *Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York* [1998] 1 CLJ 424 the court was concerned with an O. 14 application. Likewise in *Singham Sulaiman Sdn Bhd (berniaga sebagai Jones Lang Wootton) v. Berapit Development Sdn Bhd* [2000] 4 AMR 4428 the court too was confronted with an O. 14 application.

Madam Mahadevi then implored this court to consider her excuses and to rule in her favour. It was a submission that struck at the chord of one's heart. She itemised her excuses in these ways:

(1) that she was busy with the appeals and was thoroughly engrossed with her personal activities in India; and

(2) that she was receiving medical treatment notwithstanding the fact that no documents were annexed to support this averment.

I have deliberated at length and I have perused through the file with a toothcomb and I must rule that the defendant's excuses for the delay cannot be accepted by me for the following reasons:

(a) It is an intolerable conduct for a counsel to say that she was busy with other cases and that her private matters had taken up the bulk of her time. Lawyering has never been easy and it will continue to be difficult and hazardous. Nevertheless, it was certainly not a valid excuse at all for her failure to file the summons in chambers in encl. 30 in time. It must be borne in mind that the solicitors on record is the defendant's own law firm that goes by the name of Messrs Mahadevi Nadchatiram & Partners. The defendant was certainly fortunate. She had the services of a Queen's counsel and she herself is a practising lawyer with a legal firm of her own and having other lawyers working under her wing, so to speak.

(b) It was a case of a mere assertion when the defendant said that she was receiving medical treatment because no medical reports were adduced to substantiate her version. It was also a case of a mere assertion without more when she said that she was busy with her other activities in India because she did not produce her international passport to show that she in fact had gone to India.

(c) As a practising lawyer, the defendant must know and should know that an application to strike out ought to be made before the close of the pleadings. The defendant could have filed the summons in chambers in encl. 30 at an earlier point of time but she failed to do so.

(d) This was a case where the defendant was able to file the amended defence, the re-amended defence, the application for amendment and the re-re-amended defence yet the defendant failed to file the summons in chambers in encl. 30 on time and expeditiously.

(e) There were no exceptional circumstances to warrant this court to rule in favour of the defendant. The delay was certainly not due to circumstances and factors beyond the control of the defendant. The defendant was and is certainly the mistress of her own destiny.

(f) This was also a case where the defendant saw it fit not to comply with the order of the court pursuant to the summons for directions to file the affidavit of documents verifying the list of documents. In my judgment, the party that thumbs and ignores the order of the court cannot seek the indulgence of this court.

This was not a case where the defendant can simply say that the plaintiff's case was bound to fail. This was indeed an interesting case that should proceed to full trial. The defendant had brought up the issues of *res judicata*, absolute privilege, and that the words complained of were said to be incapable of being defamatory, etc, etc. These arguments, in my judgment, were certainly matters of law that called for a full fledged trial (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; *Lonrho PLC v. Fayed And Others* [1992] 1 AC 448; *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trade Unions & Ors* [1990] 2 CLJ 405; and *Drummond-Jackson v. British Medical Association and Others* [1970] 1 All ER 1094). This was my judgment and I so hold accordingly.

Conclusion

For the reasons adumbrated above, I dismissed the appeal in encl. 51 with costs.